(23,030)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 175.

LE ROY FIBRE COMPANY

vs.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 16, 1913.

1 United States Circuit Court of Appeals, Eighth Circuit.

LE ROY FIBRE COMPANY, Plaintiff in Error,
vs.
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Defendant in Error.

Certificate to the Supreme Court of the United States.

The United States Circuit Court of Appeals for the Eighth Circuit hereby certifies that a record on a writ of error now pending before it discloses the following:

The Le Roy Fibre Company brought an action in a state court of Minnesota against the Chicago, Milwaukee & St. Paul Railway Company to recover the value of certain flax straw belonging to it and alleged to have been negligently burned and destroyed by the Railway Company. The cause was duly removed to the Circuit Court of the United States for the District of Minnesota where it was tried. One of the grounds of negligence set forth in the complaint was that a locomotive engine of the defendant, while drawing a train of cars past the premises upon which the straw was stacked, was so negligently and carelessly operated by defendant's employés that it emitted and threw sparks and coals of unusual size upon the stacks and thereby set fire to and destroyed them.

2 The evidence at the trial showed the following without dispute: Some years after defendant had constructed and commenced operating its line of railroad through Grand Meadow, Minnesota, the plaintiff established at that village a factory for the manufacture of tow from flax straw. The plaintiff had adjacent to its factory premises a tract of ground abutting upon the railroad right of way and approximately 250 by 400 feet in dimension upon which it stored flax straw it purchased for use in its manufacturing business. There were about 230 stacks arranged in two rows parallel with the right of way. Each stack contained from three to three and a half tons of straw. The distance from the center of the railroad track to the fence along the line of the right of way was fifty feet, from the fence to the nearest row of stacks twenty or twenty-five feet, and from the fence to the second row of stacks about thirty-five feet. A wagon road ran between the fence and the first row. On April 2, 1907, during a high wind, a fire started upon one of the stacks in the second row and as a result all were consumed. The fire did not reach the stack through intervening growth or refuse but first appeared on the side of the stack above the ground. The flax straw was inflammable in character. It was easily ignited and easily burned.

There was substantial evidence at the trial tending to show that the fire was started by a locomotive engine of defendant which had just passed and that through the negligent operation of defendant's

employés in charge it emitted large quantities of sparks and
3 live cinders which were carried to the straw stack by a high wind then prevailing. It was contended at the trial by defendant that plaintiff itself was negligent and that its negligence contributed to the destruction of its property. There was no evidence that plaintiff was negligent save that it had placed its property of an inflammable character upon its own premises so near the railroad tracks, that is to say, the first row of stacks seventy or seventy-five feet and the second row in which the fire started about eighty-five feet from the center of the railroad track. In other words, the character of the property and its proximity to an operated railroad for which plaintiff was responsible was the sole evidence of plaintiff's contributory negligence.

The trial court charged the jury that though the destruction of the straw was caused by defendant's negligence, yet if the plaintiff in placing and maintaining two rows of stacks of flax straw within a hundred feet of the center line of the railroad failed to exercise that ordinary care to avoid danger of firing its straw from sparks from engines passing on the railroad that a person of ordinary prudence would have exercised under like circumstances and that the failure contributed to cause the accident the plaintiff could not recover. The trial court also submitted two questions to the jury as follows:

1. Did the Fibre Company in placing and keeping two rows of flax straw within one hundred feet of the center line of the railroad fail to use the care to avoid danger to its straw from sparks of fire from engines operating on that railroad that a person of ordinary prudence would have used under like circumstances?

2. Did the engineer McDonald fail to use that degree of care to prevent sparks from his engine from firing the stacks as he passed them on April 2, 1907, that a person of ordinary prudence would have used under like circumstances?

4 The jury answered both questions in the affirmative and found a general verdict for the defendant. Judgment was accordingly entered for defendant. The plaintiff duly saved exceptions to the charge of the court regarding its contributory negligence and to the submission of the first question to the jury, and has assigned the action of the court as error.

It is further certified that the following questions of law are presented by the writ of error prosecuted by the plaintiff in the court below, the decision of which is indispensable to a determination of the case, and to the end that this court may properly discharge its duty it desires the instruction of the Supreme Court upon them.

1. In an action at law by the owner of a natural product of the soil, such as flax straw, which he lawfully stored on his own premises and which was destroyed by fire caused by the negligent operation of a locomotive engine, to recover the value thereof from the railroad company operating the engine, is it a question for the jury whether the owner was also negligent without other evidence than that the railroad company preceded the owner in the establishment of its business, that the property was inflammable in character and that it was stored near the railroad right of way and track?

2. Is it a question for the jury whether an owner who lawfully stores his property on his own premises adjacent to a railroad right of way and track is held to the exercise of reasonable care to protect it from fire set by the negligence of the railroad company and not resulting from unavoidable accident or the reasonably careful conduct of its business?

5 3. As respects liability for the destruction by fire of property lawfully held on private premises adjacent to a railroad right of way and track, does the owner discharge his full legal duty for its protection if he exercises that care which a reasonably prudent man would exercise under like circumstances to protect it from the dangers incident to the operation of the railroad conducted with reasonable care?

WILLIAM C. HOOK,
Circuit Judge.
WM. H. MUNGER,
District Judge.
DAVID P. DYER,
District Judge.

6 United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing certificate in the case of Le Roy Fibre Company, Plaintiff in Error, v. Chicago, Milwaukee & St. Paul Railway Company, No. 3422, was duly filed and entered of record in my office by order of said Court, and as directed by said Court, the said certificate is by me transmitted to the Supreme Court of the United States for its action thereon.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, this 13th day of November, A. D. 1911.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

7 [Endorsed:] U. S. Circuit Court of Appeals, Eighth Circuit, September Term, 1911. No. 3422. Le Roy Fibre Company, Plaintiff in Error, vs. Chicago, Milwaukee and St. Paul Railway Company. 14 fol. Certificate of Questions to the Supreme Court of the United States. Filed Nov. 13, 1911. John D. Jordan, Clerk.

Endorsed on cover: File No. 23,030. U. S. Circuit Court Appeals, 8th Circuit. Term No. 175. Le Roy Fibre Company vs. Chicago, Milwaukee & St. Paul Railway Company. (Certificate.) Filed January 25th, 1912. File No. 23,030.

Petition for Writ of Certiorari

In the Supreme Court of the United States.

October Term 1913.

EX PARTE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, A CORPORATION

Petitioner.

Petition for Writ of Certiorari requiring the Circuit Court of Appeals for the Eighth Judicial Circuit to certify to the Supreme Court, for its review and consideration, the case of Le Roy Fibre Company, appellant in error, against Chicago, Milwaukee & St. Paul Railway Company, respondent in error.

To the Honorable, The Supreme Court of the United States:

1—The petition of Chicago, Milwaukee & St. Paul Railway Company respectfully shows to this Honorable Court as follows: That said action was commenced in a State Court of Minnesota and duly removed to the Circuit Court of the United States for the District of Minnesota, where it was tried at the November, 1909, term of said

court, a general verdict being returned for the defendant and certain special questions which were submitted by the court to the jury for its consideration were answered and the case subsequently removed by appeal to the United States Circuit Court of Appeals for the Eighth Judicial Circuit, where argument was had in December, 1910, and thereafter and on November 13, 1911, the judges of said court certified certain questions to this Honorable Court for its instruction, viz:

(a) In an action at law by the owner of a natural product of the soil, such as flax straw, which he lawfully stored on his own premises and which was destroyed by fire caused by the negligent operation of a locomotive engine, to recover the value thereof from the railroad company operating the engine, is it a question for the jury whether the owner was also negligent without other evidence than that the railroad company preceded the owner in the establishment of its business, that the property was inflammable in character and that it was stored near the railroad right of way and tracks?

(b) Is it a question for the jury whether an owner who lawfully stores his property on his own premises adjacent to a railroad right of way and track is held to the exercise of reasonable care to protect it from fire set by the negligence of the railroad company and not resulting from unavoidable accident or the reasonably careful conduct of its business?

(c) As respects liability for the destruction by fire of property lawfully held on private premises adjacent to a railroad right of way and track, does the owner discharge his full legal duty for its

protection if he exercises that care which a reasonably prudent man would exercise under like circumstances to protect it from the dangers incident to the operation of the railroad conducted with reasonable care?

2—A certified copy of the entire record of the said case in the said Circuit Court of Appeals is herewith furnished as part of this application in conformity with Rule 37 of this Honorable Court relative to cases from Circuit Courts of Appeal, and the same is marked Exhibit "A."

3—Your petitioner is advised and believes that in advising the said Circuit Court of Appeals and in making answer to the questions above submitted, this Honorable Court should have before it the entire record, to the end that it may be more fully and completely informed of the facts and circumstances involved in said litigation upon which the learned trial court submitted the case to the jury upon the trial thereof. As will be disclosed by the record, the jury were instructed that negligence on the part of the plaintiff in error proximately contributing to its loss would defeat its right of recovery and entitle the defendant in error to a verdict. That from said record it is disclosed that the railway track of the defendant in error, its depot, sidetracks, right of way and properties, at the time of the fire complained of, had existed and been operated practically as then operated for a period of more than twenty years. That the plaintiff in error either purchased or rented an old creamery building 1,200 feet distant easterly from the depot of the defendant in error and constructed therein a flax tow mill, and in the fall of 1906 rented a tract of ground about 300x400 feet in size adja-

cent to the right of way of the defendant railway company, whereon in October of said year it stacked about two hundred and fifty stacks containing from three to four tons each of flax straw, not the product of the land so used but hauled there for storage purposes alone. These stacks filled practically the entire space of said yard, except a driveway about fifteen feet wide between the defendant company's right of way and the first row of stacks. That flax straw is the most inflammable product of the field. That the season was exceptionally dry and these stacks had been whipped by the wind from the time of stacking until the date of the fire in April, 1907. That shortly after a freight train of the defendant company passed on its way east on the date of the fire, and fire was seen to start up suddenly in the southwest corner of the first row of stacks, a distance of some 1,600 feet east of the station or depot building and about 75 feet from the center of the right of way of the defendant in error. That there was a very strong wind, amounting almost to a gale, blowing from the southwesterly direction across the right of way of the defendant company and over the stacks of flax straw referred to. The appellant in error had never before stacked any of its straw in this locality and none of it was grown thereon, but purchased from farmers and others wherever it was able to make such purchases. The plaintiff in error operated its tow mill by using a second-hand steam threshing machine engine, and used as fuel the refuse and chaff from the mill, which was very fine and inflammable,—the nearest stacks being from thirty to fifty feet from the engine-

house. The fire which started consumed all of these stacks and burned up something over 700 tons of flax straw of the alleged value of $3,500.00, for the recovery of which sum this action was brought.

4—WHEREFORE, Your petitioner respectfully prays that a Writ of Certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Eighth Judicial Circuit, commanding the said court to certify and send to this Court on a day certain to be therein designated, and for a complete transcript of the record and all of the proceedings of the said Circuit Court of Appeals in the said case there entitled the Le Roy Fibre Company, Appellant in Error, against Chicago Milwaukee & St. Paul Railway Company, Defendant in Error, No. 3422, to the end that this Honorable Court may be fully advised of all the facts and circumstances disclosed at the trial upon which the jury were instructed, and your petitioner prays that this its petition for said writ may be allowed, and that a transcript of the record and all proceedings in said Circuit Court of Appeals, duly authenticated, may be ordered certified to this Court for its inspection and review.

Dated November 10, 1913.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY

By H. H. FIELD, Chicago,
M. B. WEBBER, Winona, Minn.
Its Attorney and Solicitors

STATE OF MINNESOTA } ss.
County of Winona }

M. B. WEBBER, being first duly sworn, deposes and says that he is one of petitioner's attorneys and solicitors; that he has read and knows the contents of the foregoing petition and says that the same is true of his own knowledge, and further says not.

M. B. WEBBER

Subscribed and sworn to before me this 10th day of November, 1913.

MARGARET GARNOCK
Notary Public, Winona County, Minn.

My Commission Expires Oct. 5, 1916.

SUPREME COURT OF THE UNITED STATES

LE ROY FIBRE COMPANY
Plaintiff in Error.

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY
Defendant in Error.

To the above named Plaintiff in Error and its Attorneys and Solicitors, John J. Fitzpatrick and F. M. Catlin of St. Paul, Minnesota:

YOU WILL PLEASE TAKE NOTICE, That on Monday the 8th day of December, 1913, the defendant in error will move the Court at the Capitol in Washington, D. C., on the opening of Court that day, or as soon thereafter as counsel can be heard

upon the annexed petition, a copy of which is herewith served upon you, for a writ of certiorari to be issued, directed to and commanding the United States Circuit Court of Appeals for the Eighth Judicial Circuit to certify to the above named Court the entire record in the above entitled cause for inspection and review in determining the questions that have been certified to the Supreme Court of the United States by the Honorable Circuit Judges of Appeal.

Dated November 10, 1913.

H. H. FIELD, Chicago, Ill., and
M. B. WEBBER, Winona, Minn.
Attorneys and Solicitors for Defendant in Error

Due and personal service of the foregoing petition and notice is hereby admitted, and consent is hereby given that said petition may be brought on for hearing on any motion day ex parte and without further notice.

Dated November 14, 1913.

J. F. FITZPATRICK,
University Club,
St. Paul, Minn.
F. M. CATLIN,
680 Fairmont Ave.,
St. Paul, Minn.
Attorneys for Plaintiff in Error.

Supreme Court of the United States

LE ROY FIBRE COMPANY,

Plaintiff in Error.

—*vs.*—

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,

Defendant in Error.

The three questions submitted by the Circuit Court of Appeals for answer and instructions of this Court all involve the same question, viz., whether contributory negligence can ever be interposed as a defense in a case where the owner seeks to recover for the destruction of property caused by the negligent conduct of another, when such property is lawfully used or stored upon the owner's own premises?

In short, the question is, does the fact that one is lawfully using his own property upon his own premises exempt him from the charge of contributory negligence, when he seeks to recover for the destruction of such property caused by the negligence of another, even though the use made by the owner is not such as a person of *ordinary care* and *prudence* would have made?

The contention of counsel for plaintiff in error is that no matter how one may conduct his business upon his own premises, contributory negligence cannot be urged against him in a case brought by him to recover damages caused to his property by the negligence of an adjacent owner; in short, that no case of the kind can arise which presents the question of contributory negligence as one of fact for a jury; that one may conduct his own business in a manner best adapted to invite the very peril which overtakes him, and nevertheless recover damages notwithstanding his culpable carelessness, because forsooth his negligent act was committed upon his own premises. This position we combat, and affirm it to be an exception rather than the rule, when a court may declare as a matter of law the conduct of plaintiff in a given case, either does or does not constitute negligence. Because the facts are not disputed, matters not. The question is, whether under all the circumstances an *ordinarily prudent man* would or would not have so acted, and such questions are eminently for a jury.

Many loose statements may be found in the books as to the rights of one in the enjoyment of his own property, and that one cannot be driven from the use of his own in any legitimate business because of the fact that his neighbor is negligent; but it is equally true that *one may not run into danger, even on his own property and in the conduct of his own business; neither can he recover for the consequences that result from his culpable acts.* When one conducts his business in a manner, and at a place, that a person of ordinary care and prudence would not, then he is not within the protection of the law outlined in cases relied upon by counsel.

The gist of the authorities is that the mere fact that the plaintiff leaves his land in its natural state, near or next to a railroad, is not chargeable with contributory negligence. Neither is a plaintiff prevented from making legitimate use of his property because near a railroad right of way, but where he *affirmatively* does some act which renders the situation more hazardous, and that act is one that a person of ordinary prudence and care would not have committed, he cannot recover, and the question as to whether or not his conduct is that of a person of ordinary care and prudence is a question of fact for a jury.

In *Railway Company vs. Johnson, 54 Fed. 474*, an action brought to recover for the burning of numerous stacks of hay some distance from the line of railway, where the owner had done nothing more than leave the meadow between the stacks and the railroad in its natural condition, the Court declined to charge the jury that failure to take any precautions to guard against fire by plowing around the stacks, etc., or using other means such as a careful and prudent person would have done, would constitute negligence defeating recovery, but did charge the jury as follows:

> "If you find from all the evidence in this case that the fire which plaintiff claims that defendant set and which injured him would not have occured if plaintiff had used care in the protection of his property, which a *man of ordinary prudence under like circumstances would have used*, then the plaintiff cannot recover."

In the case of *Clark vs. Railway Co., 129 Fed. 341*, where plaintiff's warehouse adjacent to the right of way of the defendant company was consumed by fire started from sparks emit-

ted from a locomotive, the plaintiff had taken no precaution to protect his buildings and the trial Court directed a verdict for the defendant company. The Circuit Court of Appeals of the Sixth Circuit reversed the lower Court, holding that the questions of negligence and contributory negligence were both issues of fact which the Court should have submitted to the jury for determination. In so doing the Court recognized the right of interposing the question of contributory negligence in cases of this kind and said:

> "In determining the questions of negligence and contributory negligence the Court would necessarily consider distance, the character of the exposure to the fires, the hour of night, the direction and veolcity of the wind, the condition of the weather as to dryness or moisture and as being clear or cloudy. In short, every fact and circumstance constituting the entire situation would be given due and proper attention. An important matter for consideration would be the precautions which either party could have easily or conveniently adopted to guard against the apparent danger. *A duty rested on each party to exercise proper care.* Such means and methods as were readily and practically available to the agents of each party should have been adopted, to the extent of exercising reasonable care and prudence. Such precautions as a reasonably prudent man would be expected to take under the given circumstances would be the measure of care required by law. These precautions should have been taken by the defendant in the instance, to prevent the emission of sparks liable

to set on fire buildings situated close by, and in the second place like care should have been exercised by plaintiff to prevent the buildings from being ignited. Neither party was required to resort to unreasonable or extremely difficult measures of precaution."

The voluntary and needless accumulation of shavings or other combustible matter upon the land close to a railroad has been regarded and held to constitute contributory negligence. Such a case is plainly distinguishable from those cases in which combustible matter had accumulated by the act of nature.

Sherman & Redfield on Negligence, Sec. 679.

Murphy vs. Chicago, etc. Ry. Co., 45 Wis. 222.

Ward vs. Milwaukee Ry. Co., 29 Wis. 144.

Where plaintiff's stable was about two feet from the railroad fence, he threw the bedding of the horse out of the window and allowed it to accumulate during a dry season from spring until the end of July near the track where it was set fire to by sparks from an engine. Held, his negligence was a question for the jury.

Collins vs. N. Y. Cen. Ry. Co., 5 Hun. 499 (71 N. Y. 609).

Where plaintiff placed his cornstalks so near the railroad track that they took fire from the spark of a locomotive.

Niskern vs. Chicago Ry. Co., 22 Fed. 811.

In *Railway Co. vs. Shanefelt, 47 Ill. 497*, it was held that owners of land contiguous to railroads were as much bound in law to keep lands free from an accumulation of dry grass and weeds as railroad companies were.

The Supreme Court of the State of Minnesota has held that plaintiff's omission to plow around his stacks of hay 150 feet from a railroad company's track does not constitute negli-

gence *per se*. Whether such a failure amounts to negligence in any case, depends upon circumstances, and is a question of fact for a jury.

Hoffman vs. C. M. & St. P. Ry. Co., 40 Minn. 60.

Karsen vs. C. M. & St. P. Ry. Co., 29 Minn. 12.

In *Martin vs. North Star Iron Works, 31 Minn. 407*, which was an action for personal injuries sustained by the plaintiff because of the alleged negligence of the defendant. On appeal, Chief Justice Gilfillan said:

> "If one by negligence makes it permanently dangerous to another to continue in a lawful employment, or in the lawful use and occupation of his property, the law will attribute to the latter, if he so continue, the consequence of the negligence of the former, so as to prevent recovery in case of injury from the negligence."

Schell vs. Second National Bank of St. Paul, 14 Minn. 34, was an action brought by the plaintiff for injuries sustained by him while sitting in his office because of the falling of a wall owned by the defendant company. The defendant requested the Court to charge the jury that if the plaintiff was himself guilty of negligence which contributed to his injury, the defendant was not liable. The trial Court gave his instruction and added:

> "It is another principle of law that the plaintiff cannot recover if his own negligence contributed to the injury. It is claimed that this principle does not apply here, where the plaintiff was in the lawful enjoyment of his own property. It is undoubtedly true that a man cannot be driven from the use of

his own property by the acts or negligence of his neighbor. He may use and occupy his own property, and although it may be in an exposed condition, that does not absolve his neighbor from the exercise of proper care; but a man has no right to invite peril, or run into danger, even on his own property."

The Supreme Court affirmed this instruction.

The case of *Murphy vs. C. & N. W. Ry. Co., 45 Wis. 222*, was an action brought by the plaintiff to recover of the Railway Company damages for the loss of a barn and contents of a small shop and warehouse adjacent to the right of way of the defendant company. The buildings were within twelve feet of the line of the main track of the defendant's road. For some time previous to the fire, the barn had been used for pressing hay and for storing hay. The shop was used as a carpenter shop, was set up on blocks two and a half feet high, and the side next to the railroad was open below the sills. Some straw, hay and shavings had accumulated under the small building and in the space between the buildings, and about the barn loose hay had accumulated. The fire commenced either in or under the small building and communicated from that to the large barn. There was a high wind blowing from the west, the weather was dry and had been for some time. The fire was undoubtedly set out by sparks from the defendant company's locomotive. The evidence showed that the defendant's spark arresting appliances were not in perfect condition. The chief exception taken by the counsel for the defendant railway company was that the trial Court refused to submit to the jury the question of contributory negligence on the part of the respondent pre-

dicated upon the evidence that he allowed hay, straw and shavings to accumulate under the buildings, and allowed the space under the sills of the small building to remain open, and that he allowed the hay to scatter upon the ground near the line of railway track, and to remain and accumulate there. The trial Court refused to submit the question of contributory negligence to the jury and charged them as follows:

> "This obligation of care, the want of which constitutes negligence according to the circumstances, is imposed upon the party who uses the fire, and not upon the person whose property is expose to damage by reason of the negligence of such party. * * * While, as I have said, the defendants in this action had the right to use their way in the transaction of their legitimate business, while they had the right to use fire there, the plaintiff on his part had a right to use his own land adjoining the track of the defendant as he saw fit; and if, through the negligence of the defendant, the property of the plaintiff took fire, the defendant is liable to the plaintiff for the damages sustained."

In a very exhaustive opinion by the Supreme Court, the lower Court was reversed because of his refusal to submit the question of contributory negligence as requested. After reviewing numerouse cases in support of the plaintiff's contention, among other things the Court said:

> "None of these cases established the doctrine contended for by the plaintiff, and none of them negative the proposition that the owner of lands adjoining the track of a railroad may, by gross negligence in the manner of

> the construction of his buildings, or in the manner of conducting his business in and about the same, in the immediate vicinity of such railroad track, be chargeable with contributory negligence which might prevent a recovery by him in an action to recover for the destruction of such buildings or other property by fire communicated by the negligent act of the railroad company. * * * The rule that, in actions to recover damages caused by the negligence of the defendant, negligence on the part of the plaintiff which directly contributed to the occurence which caused the damage, will defeat the plaintiff's action, is universal, unless a different rule be prescribed by statute. * * * * The negligence of the defendant must be the sole cause of the injury. * * * The only question to be determined is, whether negligence can be imputed to the owner of lands or buildings adjoining a railway track, on account of anything done by him, either in the location or manner of constructing such buildings, in the manner of maintaining them, the purpose for which he uses them, or the manner of such use."

Then referring to the instruction of the trial Court, further said:

> "We cannot sanction this broad doctrine, exempting the owner from the exercise of ordniary care in the management of his property. Such a rule is neither promotive of public or private morals, and we think it not sanctioned by the weight of authority. The necessities of civilized society require very

many limitations to the broad statement that a man may do as he sees fit on his own lands with his own property. The laws in very many cases restrict such right, and punish the exercise of it. The municipal regulations of our cities prevent the carrying on of dangerous trades or the keeping of large quantities of dangerously explosive articles in the densely inhabited parts thereof. * * * We do not think that where the careless and negligent acts of a plaintiff result in kinding a fire on his own lands, he will be exempt from the charge of having contributed to the loss occasioned by such fire, merely because such negligent acts were done upon his lands. * * * We intend to hold, and do hold, that the doctrine of contributory negligence on the part of the plaintiff is applicable to the case at bar, as well as to all other cases where a recovery is sought to be had on the ground of the negligent acts of the defendant; and we further hold that the negligent and careless acts of the plaintiff upon his own lands adjoining a railroad, although such acts may be in themselves lawful; may amount to contributory negligence, according to the circumstances. * * * If buildings are not constructed of such materials and in such a manner as a man of ordinary prudence would construct the same, under the circumstances, or if they are not used with the care with which a man of ordinary prudence would use them under like circumstances, and the want of such care, either in the use or construction of such buildings or

management of such business, contributed directly to the communication of the fire which destroyed the same, then the owner cannot recover. In other words, if the jury to whom the facts are submitted find that the fire would not have occurred if the plaintiff had used the care, in the construction, maintenance and use of his property, which a man of ordinary prudence would have used under like circumstances, then the plaintiff cannot recover. * * * This is the rule which we think is well established by the authorities, and accords with justice and common sense. We see no reason why a man who recklessly and unnecessarily exposes his property to destruction by fire in the immediate vicinity of a railroad, which from the necessity of the case must use the dangerous element in carrying on its business, should as a general rule be protected, if by the use of ordinary care he could have avoided its destruction any more than the man who recklessly and unnecessarily places his property upon the track, and it is thereby destroyed. * * * We are inclined to hold that, where a person places a building so constructed as to be easily ignited by fire, or other property of a highly combustible nature, in the immediate vicinity of a railroad, without any protection, and thereby increases the chances of its destruction, or where he carries on a business in the immediate vicinity of such road, which from its nature is extremely hazardous in such vicinity on account of its susceptibility

> to ignition and combustion from the sparks emitted from the passing engines, and such property is destroyed from fire communicated by such engines, in an action to recover for the value thereof on account of the negligence of the railroad company, it necessarily becomes a question whether such building was constructed in such a manner as a person of ordinary care and prudence would have constructed it under like circumstances; or, if it be combustible property, whether a man of ordinary prudence would have placed the same where it was placed by the plaintiff and with like protection against fire."

The owner of an unfinished building is bound to use ordinary care, and whether it was contributory negligence to leave a door of such unfinished building open is for the jury.

Fero vs. Buffalo, etc. Ry. Co., 22 N. Y. 209.

In the case last cited the trial Court declined to hold that the facts established contributory negligence, but submitted the question to the jury and charged:

> "The plaintiff was bound to use such care in protecting his premises as a man of ordinary prudence would have employed under the circumstances, and if through his neglect or that of his employes his house was consumed, or if such neglect on his part concurred with the negligence on the part of the defendants in producing the result, the plaintiff cannot recover."

The Supreme Court of Nebraska held that while negligence cannot be predicated upon the ordinary use of one's property, still one may not recover in case his loss was caused by his failure

to exercise such precautions as a person of ordinary prudence would exercise for the protection of his own property.

> "To hold that with knowledge of the danger, he may place combustible materials in such a manner as to invite the spread of any fire which may be set out, and notwithstanding such act, recover, would be to establish a rule wholly foreign to the spirit of our law, and as unjust as it is unique."

Omaha Fair & Exposition Co., vs. Mo. Pac. Ry. Co., 60 N. W. 320.

A party who erects his buildings on or near the track of a railway company knows the dangers incident to the use of steam as a motive power, and must be held to assume some of the hazards connected with its use on those great thoroughfares.

Toledo, W. & W. R. R. Co., vs. Larmon, 67 Ill. 68.

Chicago & Alton R. R. Co., vs. Pennell, 94 Ill. 448.

The Supreme Court of Kansas reversed the lower Court for refusal to give the following instruction to the jury:

> "It is a circumstance the jury may consider, as going to prove contributory negligence, that the plaintiff stacked his hay near the railroad track, without guarding it in any way from fire. Persons who live near railroads are bound to take notice of the increased danger to their property from fire and to exercise a proportionate amount of care to protect it."

Kansas City, Fort Scott, etc. R. R. vs. Owen 25 Kas. 419.

K. P. R. R. Co. vs. Bradey, 17 Kas. 380.

Mo. Pac. Ry. Co. vs. Cornell, 30 Kas. 35.

The last case cited was an action for damages occasioned by fire set out by the defendant company. The weather and vegetation was dry and a high wind was prevailing; trees in the orchards were heavily mulcted; large quantities of manure was spread around each tree; many of the trees were wrapped with grass, straw and stalks; the orchard was covered with old grass and cornstalks. Counsel for the railroad company asked the Court to instruct the jury that if the plaintiff was guilty of negligence contributing directly to the injuries complained of, he cannot recover, which instruction was refused. The Supreme Court reversed the lower Court and said:

> "If the plaintiff below was equally guilty in failing to use reasonable means to avoid the destruction of his property, his failure to do so would also be negligence; and if he were thus guilty of like negligence with the railway company, he cannot recover."

Where a warehouse adjacent to the right of way of a railroad company was left open, with windows unglased and other openings in which fire emitted from the locomotive engine would probably be blown, the Court held the question of plaintiff's negligence was for the jury and said:

> "It is for the jury to ascertain from the evidence whether the loss resulted from an unnecessary exposure of the building by the owners, and an instruction which ingores the negligence of the owner, and under which the jury may have supposed that they were at liberty to find for the plaintiff, notwithstanding he may have been guilty of negligence materially contributing to the injury, is erroneous."

G. W. Ry. Co. vs. Haworth, et al, 39 Ill. 347.

The rule that contributory negligence on the part of plaintiff will bar a recovery, is relaxed in Illinois, only in cases where the negligence of the plaintiff is slight, and that of the defendant in comparison *gross*.

Railroad Co. vs. Hillmar, 72 Ill. 235.

I. C. Railroad Co. vs. Hammer, et al, 72 Ill. 347.

C. & N. W. Ry. Co. vs. Hatch, 79 Ill. 137.

Village of Kewanee vs. Depew, 80 Ill. 119.

C. B. & Q. Ry. Co. vs. Gregory, 58 Ill. 272.

However, the doctrine of comparative negligence does not prevail in Minnesota, and we believe does obtain only in the States of Illionois and Georgia. Neither does the last chance doctrine prevail in Minnesota. Such a rule in cases of concurrent negligence proximately contributing to the injury, would practically do away with the doctrine of contributory negligence.

Fonda vs. St. Paul City Ry. Co., 71 Minn. 438.

See Bigelow on Torts, 311.

The case of *Keese vs. C. & N. W. Ry. Co., 30 Iowa 78*, is an instructive case illustrative of the doctrine we contend for. The action was brought by plaintiff to recover damages for the negligent burning of plaintiff's hay stacks situated on the open prairie some distance from the railroad track. The trial Court charged the jury as follows:

> "When a person in the ordinary exercise of his own rights, allows or places his property in an exposed position and it is injured or destroyed by reason of the negligence of another, he may still recover for the consequences of such negligence. When a party leaves his property in an exposed position he takes the risk of accidents, but not the

> risk of another's negligence. If the plaintiff had his property in an exposed position, or put it up in an imprudent manner, if he placed it on his own premises, or where he had a lawful right to place it, he took the risk of its being burned by the accidental escape of fire from defendant's engines running near it; but he did not take the risk of negligence on the part of the defendants, and if his property has been destroyed by their negligence, he is entitled to recover its value."

There was a verdict for the plaintiff and the Railway Company appealed and the lower Court was reversed. The Supreme Court said:

> "The general scheme embodied in this instruction is that every person may use his own property for any lawful purpose at his pleasure, taking only the risk of accidents, and retaining the right to recover for its injury or destruction by the negligence of another, cannot be disputed. This system was announced in and is well illustrated by the case of *Cook vs. Transportation Company, First Denio 91*, but that it has its limitation is very apparent from the proposition stated, as well as from the equally well settled doctrine that where a plaintiff has, by his negligence contributed to a loss he cannot recover therefor. The owner of land along a railway has the right to stack his wheat or hay, or to build or operate a powder house on the line or margin of the right of way of a railroad, but his instinctive sense of prudence, inate in every reasonable person, would see that such a use

of one's own property was per se negligence,—carelessness. It being negligence to thus place his property in such an exposed position, he could not recover, although it should be destroyed by reason of the negligence of a railroad company, because his own negligence in thus placing his property contributed to the injury and loss. Or, if the owner of an elevator on the line of a railroad should make a thatched roof, instead of a shingle or slate roof, which he clearly has an abstract right to do, and by reason of such thatched roof and the negligence of the employes of the railway company his elevator should be consumed by fire, could he recover? Clearly not, and why? Not because he had no right to build his elevator and thatch the roof, but because to do so was negligence,—carelessness, which contributed to the loss.

See also—*Garrett vs. Railway Co., 36 Iowa 121.*
Slosson vs. Railway Co., 60 Iowa 215.
Bryant vs. Railway Co., 56 Vt. 710.

Many of the cases cited by counsel, indeed most of the cases, when limited to the precise points presented by the facts of such case do not sustain their position.

All there is in *Inland Coasting Co. vs. Tolson, 139, U. S. 551,* is the enunciation of a familiar doctrine. While there may be some negligence on the part of plaintiff, yet that does not justify or excuse the defendant from failing to use ordinary care after discovering the plaintiff in his position from doing him injury. This is elementary law.

The case of *Grand Trunk R. R. Co. vs. Richardson, 91, U. S. 454,* likewise is not an authority for plaintiff's contention. The statute of Vermont there being construed made railway companies liable for property destroyed by fire communicated by locomotive engines, and gave such companies an insurable interest in such property and the question of contributory negligence was not in issue.

In the case of *Louisville Ry. Co. vs. Beeler, 11 L. R. A. (N. S.) 930,* the respondent landowner had committed no affirmative act of negligence contributing to his injury. He simply left his property in its natural state, while the railroad company had affirmatively committeed a negligent act in cutting the grass and weeds on its right of way and leaving same to dry in which fire negligently scattered, started the conflagration which did the damage complained of.

In the absence of special legislation a man does not become a wrong-doer by leaving his property in a state of nature.

Salmon vs. Railroad Co., 38 N. J. L. 5.

The case of *Kellogg vs. Railroad Co., 26 Wis. 223,* cited in counsel's brief, when the facts are considered, and what the Court really decided does not support counsel, and whatever of comfort they do find in some utterances *arguendo* of the judge writing that opinion, have been expressly disapproved by that Court in *Murphy vs. Railway Company* heretofore cited in this brief.

Counsel contend in their brief that "the question of the owner's negligence in the case presented is properly one of law alone." We deny that the facts of the present case as to the owner's negligence present a question of law, and that upon the facts the learned trial judge pro-

perly submitted the question of the owner's negligence to the jury for its determination as one of fact. What the owner does in the use of his property, or in placing inflammable or combustible material on his property, where it is likely to be consumed, presents a question alone for a jury to say whether an ordinarily prudent and careful person would have done so. We cannot differentiate between the instant case and any other where both parties are negligent, and such negligence proximately contributes to the injuries complained of. The law in such cases leaves the parties to suffer the consequences resulting from such negligence. It is fallacious to say that it is no concern of defendant that plaintiff was negligent, without which negligence the damage complained of would not have resulted, because such negligence was upon his own premises.

It is not always a breach of duty that constitutes negligence. One may be negligent in using his own property, and yet owe no duty to his neighbor to handle it carefully. But when such negligence combined with that of his neighbor causes one damage, which would not have resulted had he been ordinarily careful, he cannot saddle the loss upon his neighbor.

The instant case is not one involving damage to property left in its natural state,—as for instance a timber lot, a farmer's meadow, or the stubble on his grain field,—but does involve the affirmative act of bringing in from the adjacent country the most inflammable product of the field, and stacking it on a vacant lot abutting the right of way of the defendant in error, where it was more likely to be burned than not,—an act no ordinarily prudent person would have done.

If the contention of counsel for plaintiff in error is declared the law, a ready and profit-

able market will then be made for many kinds of property not otherwise saleable.

Respectfully submitted,

H. H. FIELD, Chicago, Ill.

M. B. WEBBER, Winona, Minn.

United States Supreme Court.

OCTOBER TERM, 1913.

No. 175.

LE ROY FIBRE COMPANY,
Plaintiff in Error,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,
Defendant in Error.

IN AN ACTION AT LAW BY THE OWNER OF A NATURAL PRODUCT OF THE SOIL SUCH AS FLAX STRAW, WHICH HE LAWFULLY STORED ON HIS OWN PREMISES AND WHICH WAS DESTROYED BY FIRE CAUSED BY THE NEGLIGENT OPERATION OF A LOCOMOTIVE ENGINE TO RECOVER THE VALUE THEREOF FROM THE RAILROAD COMPANY OPERATING THE ENGINE, IS IT A QUESTION FOR THE JURY WHETHER THE OWNER WAS ALSO NEGLIGENT WITHOUT OTHER EVIDENCE THAN THAT THE RAILROAD COMPANY PRECEDED THE OWNER IN THE ESTABLISHMENT OF ITS BUSINESS, THAT THE PROPERTY WAS INFLAMMABLE IN CHARACTER AND THAT IT WAS STORED NEAR THE RAILROAD RIGHT OF WAY AND TRACK?

I.

The Le Roy Fibre Company, plaintiff in error, contends that this question should be answered in the negative.

The question of the owner's engligence in the case presented is purely one of law alone.

This is so because as a legal proposition it is true that evidence that the railroad company preceded the owner in establishing its business, and that the property destroyed by its negligence was inflammable in character but lawfully stored

on the owner's own premises near the right of way, is not evidence of negligence of the owner in such a case.

For the owner has the same right to use his property adjacent to a railroad right of way for any lawful purpose for which it is adapted as he would have if there was no railroad there.

The only limitation upon the use and enjoyment of his property is that he use and enjoy it in such a manner as not to injure that of another.

This is the sum and substance of his whole duty.

In storing his own property upon his own premises he exercises a lawful right. From that act no possible injury can come.

In locating it on his own premises even near the right of way he owes the railroad company no duty to anticipate or guard against injury to it from the negligence of the railroad company.

Without the breach of some duty by the owner there can be no negligence on his part.

He has violated no duty and hence is guilty of no negligence.

Grand Trunk R. R. Co. v. Richardson, 91 U. S. 454; 473.

Cincinnati &c. R. R. Co. v. South Fork Coal Co., 139 Fed. 530.

Thompson on Negligence, Section 2314.

Shearman & Redfield on Negligence, Section 680.

Richmond & D. R. R. Co. v. Medley, 75 Va. 499.

Louisville & N. R. R. Co. v. Marbury Lumber Co., 125 Ala. 235; 50 L. R. A. 620.

Patten v. St. Louis &c. R. R. Co., 87 Mo. 117.

Kellogg v. C. N. W. R. R. Co., 26 Wis. 223.

Salmon v. Ry. Co., 38 N. J. L. 5.

L. & N. R. R. Co. v. Richardson, 66 Ind. 43.

Pittsburgh &c. R. R. Co. v. Jones, 86 Ind. 496.

Louisville & N. R. R. Co. v. Beeler, (Ky.) 103 S. W. 300. 11 L. R. A. (N. S.) 930.

Cleveland C. St. L. R. R. Co. v. Scantland, (Ind.) 51 N. E. 1068.

Philadelphia R. R. Co. v. Hendrickson, 80 Penn. St. 182.

Reed v. Missouri P. R. R. Co., 50 Mo. App. 504.

Rutherford v. Texas & P. R. R. Co. (Texas), 61 S. W. 422.

Gulf C. & S. R. R. Co. v. Fields, 2 Texas App. Civ. Cas. 700.

Kimball v. Borden, 97 Va. 477; 34 S. E. 45.

Kalbfleisch v. Long Island R. R. Co., 102 N. Y. 520.

Louisville & N. R. R. Co. v. Malone, 116 Ala. 600.

3 Elliott on Railroads, Section 1228.

In Grand Trunk R. R. Co. v. Richardson, 91 U. S. 454, 473, the plaintiff after the railroad was established built a lumber mill and stored lumber partly on its own property and partly on the right of way of the railroad company, having a license from the company to so use this portion of the right of way. Its lumber and mill were burned through negligence of the railroad in operating a locomotive, and it was contended the plaintiff could not recover because it located its mill and lumber so near the track. But this court said, at page 473:

> "Such a location, if there was a license was a lawful use of its property by the plaintiffs, and they did not lose their right to compensation for its loss occasioned by the negligence of the defendant."

In Cincinnati &c. R. R. Co. v. South Fork Coal Co., 139 Fed. 530, Justice Lurton, after reviewing the authorities, said:

> "But in so far as the opinions go upon the theory that a plaintiff must lose his right of compensation for the negligent destruction of his own property situated upon his own premises because he had exposed it to dangers which could come to it only through the negligence of the railroad company they do not meet our approval. Grand Trunk R. R. Co. v. Richardson, 91 U. S. 454; Kellogg v. R. R. Co., 26 Wis. 223; Fero v. Buffalo &c. R. R. Co., 22 N. Y. 209, 215; Burke v. R. R., 7 Heisk 464. The rights of persons to the use and enjoyment of their own property are held upon no such tenure as this. The principle would forbid the use of property for many purposes, if in such proximity to a railroad track as to expose it to danger attributed to the negligent management of its business."

Thompson in his work on Negligence, at Section 2314, says:

> "The principle which the decisions affirm is that the land owner is not by reason of the fact that a railway extends along his land bound to use his land in any other way than the way in which he would use it if the railway was not there; but that he is at liberty in determining the mode in which he will use his land to disregard the very existence of the railway, subject however to the risk of having his property burned without recourse against the railway company in case of a fire set by the company by unavoidable accident and without negligence."

In Shearman & Redfield on Negligence, Section 680, the author says:

> "He is not required to anticipate negligence on the part of the railroad company, nor to give up the lawful use of his property in such manner as would be deemed prudent under ordinary circumstances simply because a railroad has been constructed beside his land."

In Louisville & N. R. R. Co. v. Marbury Lumber Co., 125 Ala. 235, cotton placed by the owner within fifty feet of the track was set on fire by sparks from defendant's locomotive negligently operated, and it was held, that the location of the cotton by the owners of it so near to the track constituted no defense.

It is immaterial that the railroad company preceded the owner in the establishment of its business, or that the property destroyed is inflammable in character.

Cleveland C. & St. L. R. R. Co. v. Scantland, 51 N. E. 1068.

Grand Trunk R. R. Co. v. Richardson, 91 U. S. 454; 473.

Philadelphia & R. R. Co. v. Hendrickson, 80 Penn. St. 182.

In Cleveland R .R. Co. v. Scantland, 51 N. E. 1068, after the railroad was established the plaintiffs built a warehouse on their own property within sixty-six feet of the track in which they stored dry oak lumber and elm hoops, which were of inflammable nature and liable to take fire. They were burned by sparks negligently thrown from the defendant's locomotive, and it was held that the fact that the warehouse was so near the track did not, nor did the fact that the material stored was inflammable, or that the plaintiff built his ware-

house after the railroad was located and in operation, constitute any defense.

In Philadelphia R. R. Co. v. Hendrickson, 80 Penn. 182, it was held that it was no defense that the owner of a barn located close to the railroad company's right of way failed to protect its roof by covering with slate or metal instead of shingles, which were ignited by sparks from an engine negligently operated.

In Reed v. Mo. R. R. Co., 50 Mo. App. 504, it was held to be no defense in an action for the value of plaintiff's hay destroyed by fire negligently started from defendant's locomotive, to show that it was stacked closer to the right of way than it should have been.

In Rutherford v. Texas & P. R. R. Co., 61 S. W. 420, it was held that it was no defense, that the owner of a barn within fifty feet of the right of way stored hay therein which was destroyed by fire started by sparks from defendant's locomotive negligently operated.

In Kimball v. Borden, 97 Va. 477, it was held that it constituted no defense to show that the owner of a building located near the right of way used as a cooper shop, permitted shavings and other combustible materials to accumulate about the building which were fired by sparks from a passing locomotive negligently operated.

In Kalbfleisch v. Long Island R. R. Co., 102 N. Y. 520, it was held to be no defense that a kettle of varnish removed from a building adjoining the right of way and occupied as a varnish factory was brought to the open air where the inflammable vapor arising from it was ignited from a passing locomotive which had a defective spark arrester, and the flames were communicated to and destroyed the building.

In Louisville & N. R. R. Co. v. Malone, 116 Ala. 600, it was held to be no defense that the owner of a house situated sixty-three feet from the railroad track, permitted dry leaves to accumulate in a valley on the roof, which were ignited by sparks from a passing engine negligently operated.

II.

IS IT A QUESTION FOR THE JURY WHETHER AN OWNER WHO LAWFULLY STORES HIS PROPERTY ON HIS OWN PREMISES ADJACENT TO A RAILROAD RIGHT OF WAY AND TRACK IS HELD TO THE EXERCISE OF REASONABLE CARE TO PROTECT IT FROM FIRE SET BY THE NEGLIGENCE OF THE RAILROAD COMPANY AND NOT RESULTING FROM UNAVOIDABLE ACCIDENT OR THE REASONABLY CAREFUL CONDUCT OF ITS BUSINESS?

The plaintiff in error contends that this question should be answered in the negative.

The doctrine of contributory negligence of the owner has no application in such a case.

Louisville & Nashville R. R. Co. v. Marbury, 125 Ala. 235; 50 L. R. A. 620.

Philadelphia R. R. Co. v. Hendrickson, 80 Penn. 182; 13 Am. & Eng. Ency. 482.

2 Thompson on Negligence, Section 2314.

Kendrick v. Towle, 60 Mich. 363.

Mississippi Ins. Co. v. Louisville R. R. Co., 70 Miss. 119.

Louisville R. R. Co. v. Beeler, (Ky.) 11 L. R. A. (N. S.) 930.

In Kendrick v. Towle, 60 Mich. 363, it was held that the plaintiff could not be charged with contributory negligence in permitting sawdust and cull shingles to accumulate about his mill close to the defendant's track which were ignited by sparks from a locomotive and destroyed the mill, the court saying:

> "The obligation of care to prevent the fire from the defendant's engine burning the plaintiff's mill rested upon the defendant, and the fact that old combustible matter accumulated about the mill and in near proximity to the railroad cannot be urged as contributory negligence. He was not obliged to guard his premises to relieve the defendant from liability for his negligent acts."

In Mississippi Insurance Co. v. Louisville R. R. Co., 70 Miss. 119, the plaintiff's shingle mill was close to defendant's tracks. It was held, that it was not contributory negligence for the plaintiff to permit the space between the tracks and his mill to become covered with an accumulation of shavings which were ignited by sparks negligently emitted from defendant's locomotive, as the plaintiff had the right to use his land in a natural and ordinary way for purposes to which it was suited, and was not required to anticipate negligence upon the part of the railway company.

In Gulf C. & S. R. R. Co. v. Fields, 2 Texas App. Civ. Cas. 700, it is held that the owner of land adjacent to a railroad track having stacks of straw and oats upon his premises is not guilty of contributory negligence in permitting grass to grow up around the stacks, as he is not bound to foresee negligence of the railroad company in permitting fires to be communicated from its engines to his land.

In Louisville & N. R. R. Co. v. Beeler, 11 L. R. A. (N. S.) 930, the plaintiff's orchard was injured by fire negligently communicated from defendant's locomotive to grass and weeds in and about the orchard, it was held, that the owner of land adjoining a railroad right of way owes the railroad company no duty to keep his land free from grass, weeds or brush to avoid injury by fire, and could not be chargeable with contributory negligence in such a case.

III.

AS RESPECTS LIABILITY FOR THE DESTRUCTION BY FIRE OF PROPERTY LAWFULLY HELD ON PRIVATE PREMISES ADJACENT TO A RAILROAD RIGHT OF WAY AND TRACK DOES THE OWNER DISCHARGE HIS FULL LEGAL DUTY FOR ITS PROTECTION IF HE EXERCISES THAT CARE WHICH A REASONABLY PRUDENT MAN WOULD EXERCISE UNDER LIKE CIRCUMSTANCES TO PROTECT IT FROM THE DANGERS INCIDENT TO THE OPERATION OF THE RAILROAD CONDUCTED WITH REASONABLE CARE?

The plaintiff in error contends that this question should be answered in the affirmative.

The owner does even more than discharge his full legal duty if he exercises the care of a reasonably prudent man, under like circumstances, to protect his property from the dangers incident to the operation of the railroad, because under the authorities which we have cited above the owner has a right to use his property in the same manner as he would if there were no railroad adjacent to it.

But in no event is there any duty resting upon him to protect his property from injury by the negligence of the railroad company.

Fero v. Buffalo R. R. Co., 22 N. Y. 209.

Cook v. Champlain Transportation Co., 1 Denio 91.

IV.

THE NEGLIGENCE OF THE RAILROAD COMPANY IS THE PROXIMATE CAUSE OF THE LOSS.

Reed v. Missouri P. R. Co., 50 Mo. App. 504.

The use made by the owner of his land, the location of the property destroyed upon it, near the right of way, and its inflammable character constitute a mere *condition* only and not a cause of the loss at all.

They constitute simply a *condition* or the situation with respect to which the company was required to act, and to operate its locomotive with reasonable care to avoid burning the owner's straw stacks.

Louisville & N. R. R. Co. v. East Tennessee R. R. Co., 60 Fed. 993, 996.

It did not so operate its locomotive. It operated the same negligently, and thus violated its duty to the owner to operate the same with reasonable care. Had it performed its duty toward the owner instead of violating it, the owner's straw stacks would not have been destroyed by fire.

Hence, the railroad company is liable to the owner for the loss of this property even though it might have been more prudent on the part of the owner to have stacked his straw farther away from the track.

Inland Co. v. Tolson, 139 U. S. 551; 558.

The railroad company cannot be permitted to say in defense of such an action that if the owner had used his premises for a brick yard instead of a felt factory, or if his flax straw had been iron ore, or if the straw stacks had not been there at all, the sparks negligently thrown from the locomotive would not have burned it.

The railroad company cannot relieve itself from liability for its negligent destruction of the owner's property in any such way, because it owed the owner the duty to operate its locomotive without negligence, in such a manner that it would not throw fire upon premises adjacent to its right of way no matter what lawful use was being made of such premises by the owner, or what the character of the property stored there, and because the owner had the right to use his own property for any lawful purpose for which it was suited.

Any other rule would curtail and practically prohibit the use of land adjacent to railroad tracks for thousands of the purposes of residence, manufacture, trade and commerce for which the same is now used, and in fact for any purpose.

Lumber yards, mills, factories, warehouses and elevators could no longer be built and operated adjacent to railroad tracks if the railroad company could burn them by the negligent operation of its locomotives and then escape liability on

the ground that if the premises had been used for some other purpose or the property destroyed had not been inflammable, or had been somewhere else it would not have been burned.

Moreover the old common law liability for injury done by fire, is an absolute one. Quilibet ignem solve. See opinion of Mr. Justice Gray in St. Louis &c. R. R. v. Mathews, 165 U. S. 1.

The owner assumes the risk of the loss of his property of an inflammable character from *accidental* fires wherever he stores it.

If he stores it close to a railroad track in an exposed and hazardous position the risk he assumes is of precisely the same nature and differs only in degree. The risk is greater. But that concerns him alone and no one else.

It is still the risk of loss from *accidental* fires alone. It is not the risk of loss from fires *negligently* communicated by the act of another.

He does not assume the risk of loss from the *negligence* of the railroad company.

Kendrick v. Towle, 60 Mich. 363.

Reason and authority lead to the conclusion that where the owner's property lawfully located on his own premises adjacent to a railroad right of way or track is set on fire by sparks or coals negligently thrown upon it from a locomotive operated upon such track by a railroad company the *cause* of the loss is the negligence of the railroad company.

The condition of the owner's premises and the character and location of the property destroyed cannot relieve the railroad company from its duty to operate its locomotives with reasonable care, and to respond in damages to the owner for its negligent operation of them. Because the owner is not bound to guard his property and premises against the negligence of the railroad company.

His right to make free use of his own cannot be curtailed by fear that the railroad company will make a negligent use of its property.

He is not required to spend time, labor and money in endeavoring to make his property fire proof against the negligent conduct of the railroad company.

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